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**THE POSSE COMITATUS ACT OF 1878: AN HISTORICAL PERSPECTIVE AND IMPLICATIONS FOR
HOMELAND DEFENSE**

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ABSTRACT

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This paper will explore the historical background of the Posse Comitatus Act and determine why Congress passed it into law. It will then determine the implications for the U.S. military. Questions that the paper will review are what were the causes of the Posse Comitatus Act and how is that relevant to a reevaluation of the law? Northern Command, as the newly established combatant command responsible for homeland defense, must have the freedom of action to execute this task. Congress created the Posse Comitatus Act and can repeal or adjust the law if the circumstances require. The events leading up to the passage of the Act show that the Army performed the mission of support to civilian law enforcement extremely well and with discipline and restraint. The law was a result of a political compromise that led to the end of Reconstruction, not due to misbehavior or an abuse of power by the Army. Today's military can execute the task in a similar fashion. In order to permit the military to effectively support civilian law enforcement given the current terrorist threat, Congress must rewrite the Posse Comitatus Act.

TABLE OF CONTENTS

ABSTRACT	III
THE POSSE COMITATUS ACT OF 1878: AN HISTORICAL PERSPECTIVE AND IMPLICATIONS FOR HOMELAND DEFENSE	1
THE POSSE COMITATUS ACT HISTORICAL BACKGROUND	1
POSSE COMITATUS ACT LEGISLATION.....	1
CIVIL WAR RECONSTRUCTION.....	2
ARMY EMPLOYMENT AGAINST CIVIL UNREST IN LOUISIANA DURING 1874.....	4
ARMY EMPLOYMENT DURING THE PRESIDENTIAL ELECTION OF 1876	5
ARMY EMPLOYMENT DURING THE RAILROAD STRIKE OF 1877	6
AN ASSESSMENT OF THE ARMY’S PERFORMANCE DURING THE CIVIL STRIFE OF THE 1870’S.....	8
DEVELOPMENT OF THE 1878 POSSE COMITATUS LEGISLATION.....	11
INTENT OF THE POSSE COMITATUS ACT	12
CURRENT IMPLICATIONS OF THE POSSE COMITATUS ACT	13
MILITARY SUPPORT TO CIVILIAN LAW ENFORCEMENT AFTER 9-11.....	13
CONGRESS AND THE MILITARY MUST REVIEW THE POSSE COMITATUS ACT.....	15
ENDNOTES.....	17
BIBLIOGRAPHY.....	19

THE POSSE COMITATUS ACT OF 1878: AN HISTORICAL PERSPECTIVE AND IMPLICATIONS FOR HOMELAND DEFENSE

THE POSSE COMITATUS ACT HISTORICAL BACKGROUND

In the aftermath of the terrorist attacks of September 11, 2001, the Federal government and the military of the United States must reevaluate the Posse Comitatus Act. The Act restricts the employment of the military in civilian law enforcement duties. With the current terrorist threat, the United States military will play a crucial role in homeland security. The legal limitations that the Act places on the military demand a review. The political and military leaders of the country need to understand the origins and the established purpose of the Posse Comitatus Act of 1878. This analysis will reveal that the military, and especially the Regular Army, performed superbly in the execution of support to civilian law enforcement prior to the enactment of Posse Comitatus. The law was a result of a political dispute, and was not a reflection of the Army's conduct during its mission of maintaining civil order. The government must reconsider the law and rewrite it in light of the contemporary danger to the country.

POSSE COMITATUS ACT LEGISLATION

Congress passed the Posse Comitatus Act on June 18, 1878. This Act was a rider to the military appropriations bill. Posse comitatus means "force of the county." The original act reads as follows:

Chapter 263, Section 15, Army as Posse Comitatus:

From and after the passage of this act it shall not be lawful to employ any part of the Army of the United States, as a posse comitatus, or otherwise, for the purpose of executing the laws, except in such cases and under such circumstances as such employment of said force need the expressly authorized by the Constitution or by act of Congress; and no money appropriated by this act shall be used to pay any of the expenses incurred in the employment of any troops in violation of this section, and any person willfully violating the provisions of this section shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by fine not exceeding ten thousand dollars or imprisonment not exceeding two years or by both such fine and imprisonment.¹

Following the establishment of the Air Force after the Second World War, Congress updated the law. The Act, as amended in 1959, reads as follows:

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.²

The verbage of the legislation, and the intent behind it, has caused confusion and misunderstandings since its inception. The law must be clear and precise so that the executive branch of the Federal government and the members of the Armed Forces recognize how to enforce it. In order for these groups to better accomplish this, it is necessary for them to understand the historical context of the law.

CIVIL WAR RECONSTRUCTION

The Posse Comitatus Act was a product of the post-Civil War Reconstruction. Following the Union victory, the federal government re-established its control in the southern states. This required the Federal Army to occupy the former Confederacy for eleven years. The purpose of this occupation was to maintain civil order, to protect the newly freed slaves, and to ensure voting rights among the population.

The local police force in many areas of the United States, especially the West, was the sheriff or the constable. Frequently, they needed assistance to catch criminals or to prevent anarchy.

These elected officials were not only subject to strong political pressures during disorders but also had a limited amount of manpower to use when mass violence arose. The sheriff's usual recourse in such circumstances, the posse comitatus, did not really serve well. Too often a posse of local citizens quickly took a side in the conflict. The end result was often chaos, violence, and bloodshed.³

In times of emergency, the sheriff could not handle the situation alone. The disadvantage of a posse was they were not trained in law enforcement functions.

Within the United States, the tradition of the military preventing civil disorder is limited. There is an aversion by the American people to allow the military to become involved with this task. This has its roots prior to the American Revolution. The British military came to the colonies in order to maintain order and to stop protests against the government.

A significant mission of the Army following the conclusion of the Civil War was the occupation of the former Confederacy.

The Army had a principal role in Reconstruction from the very beginning. As the Union armies advanced in the South, civil government collapsed, except in Sherman's military district, and the Army found itself acting in place of the civil government by extending the function of its provost marshals from policing troops to policing and, in effect, governing the occupied areas. The duties of these provost marshals ranged from establishing garbage regulations to trying to determine the loyalty of southern citizens.⁴

The reestablishment of civil authority is an inevitable function of an occupying military force. There is a vacuum created when a former hostile civil government falls. This is true of the

recent and current United States military operations in Afghanistan and Iraq. Although this is not a mission essential task for most of the military, certain units specialize in this area to assist the overall commander.

Under the Reconstruction Acts the district commanders had to cope with such matters as horse stealing, moonshining, rioting, civil court proceedings, regulating commercial law, public education, fraud, removing public officials, registering voters, holding elections, and the approving of new state constitutions by registered voters. This occupation duty absorbed somewhat more than one-third of the Army's strength and 1867.⁵

Although many, especially in the South, would argue that Reconstruction lasted too long, initially the Army's contribution was invaluable. The percentage of the Army devoted to this mission highlights the importance that the Federal government placed on it.

The military helped in maintaining order by supporting law enforcement personnel during Reconstruction. "This use of the Army was validated by the Civil Rights Act of 1866, which empowered U.S. marshals to summon and call to their aid the posse comitatus of the counties, or portions of the land or naval forces of the United States, or of the militia."⁶ This act legally permitted the Federal marshals to demand the assistance of troops when they deemed it necessary. Initially there was no civilian law enforcement in the occupied states. The Army filled this void. As Federal marshals and then local law enforcement officials resumed this task, the military continued to provide assistance. The Civil Rights Act of 1866 formalized this arrangement.

Martial law ended within a few years of the Confederate surrender at Appomattox. Civilian governments began to reassume control of local civil affairs. The Federal government permitted states to regain power.

This process was largely completed in 1870. With the ending of Congressional Reconstruction, the Army's direct supervision of civil affairs in the South came to an end and the number of troops occupation duty, which already had fallen off markedly, was reduced still further. Now its mission was to preserve the new state governments by continuing its protection of the Negroes and their white allies upon whom the governments rested, policing elections, helping to apprehend criminals, and keeping the peace in conflicts between rival state officials.⁷

The preservation of the state governments would inevitably lead to conflict with many of the populace who did not want their states to return to Federal control. Many also disagreed with the policies of the Federal government, especially granting the right to vote to former slaves. The new mission given to the military would lead to its direct involvement in civilian law enforcement.

The Army faced, in today's terms, a terrorist group in the South during Reconstruction. The Army was well suited to confront this violent group of individuals. The recent combat experience of the Civil War, although a different type of conflict, provided many officers and soldiers the ability to deal with an internal threat to the security of the country.

The Ku Klux Klan, the postwar organization that had a considerable membership by 1870-71, became an object of special concern to the Army, as it did to the Congress, because of the Klan's terroristic efforts to deliver the South from Negro-Radical Republican control. Consequently, one of the most important Army functions in this period was support of federal marshals in an effort to suppress the Klan.⁸

The Federal marshals were too few to deter or to capture the Ku Klux Klan members. The Army greatly assisted these law enforcement officials. The troops were critical to controlling this hostile band and maintaining a semblance of civil order in the South despite the Klan's efforts.

ARMY EMPLOYMENT AGAINST CIVIL UNREST IN LOUISIANA DURING 1874

The Regular Army continued their record of success in maintaining civil order during Reconstruction. There was significant unrest in Louisiana, especially in New Orleans, on both sides of the political and ideological spectrum. A group known as the White League formed. Their goal was to eliminate the political power of the Blacks and to elect White Democrat representatives.

In September 1874 3,500 leaguers, mostly Civil War veterans, overwhelmed an equal number of black militiamen and Metropolitan Police under the command of Confederate General James Longstreet and occupied the city hall, statehouse, and arsenal. They withdrew only upon the arrival of federal troops, ordered to the scene by the President.⁹

In this situation, the demonstration of force proved sufficient to forestall any violence. The credible threat of military power caused the White Leaguers to back down. This event was noteworthy in the fact that the mere appearance of well-disciplined soldiers had a powerful psychological effect as an instrument to maintain civil order.

President Ulysses S. Grant and the Federal government learned an important lesson and would not be so hesitant to employ the Army again in such situations. There were numerous opportunities to use the military due to the civil unrest in the former Confederate states.

Having suppressed the New Orleans insurrection of September 1874, Grant, newly determined to 'protect the colored voter in his rights,' ordered General Philip H. Sheridan to use federal troops to counteract violence and sustain the administration of Governor William P. Kellogg.¹⁰

Democrats forcefully tried to emplace five representatives in the Louisiana state assembly in January of 1875. Once again the Federal Army was required to step in. In order to correct the situation, "a detachment of troops entered the legislative chambers and escorted out the five claimants."¹¹ These events were successful uses of the military to restore order. This led President Grant to believe that this tactic would work again in the future, if necessary. The Presidential election of 1876 would be another test of the Federal government's ability to maintain civil obedience, especially in the South.

ARMY EMPLOYMENT DURING THE PRESIDENTIAL ELECTION OF 1876

After the successful internal affairs use of the Army in 1874, there were a number of opportunities to conduct a similar employment. Two events, in particular, clearly demonstrated that troops could execute this task extremely well.

In the chaotic and bitterly contested presidential election of 1876, the Grant administration stationed troops at southern polling places and, especially in Louisiana, roused the fury of southern Democrats. The following year the Hayes administration used troops to suppress labor disorders in the big manufacturing centers of the East, thereby antagonizing northern Democrats representing these urban constituencies. For four years, 1875-79, House Democrats went after the Army with a vengeance.¹²

The military was an excellent instrument in accomplishing the internal security policies of the Federal government. Later, however, there were political ramifications and reprisals that hurt the Army. The Democrats sought to reduce the force structure and the funding of the Army. This would eventually lead to the development of the Posse Comitatus legislation.

During the presidential election of November 1876 between the Republican Rutherford B. Hayes and the Democrat Samuel J. Tilden, the Federal government stationed troops at polling places throughout the South. The intent of this action was to permit freed Blacks the right to vote. However, the consequence of the military presence was the perception of impropriety and undue influence in political affairs. James A. Garfield, then a congressman and a future president, wrote that the "employment of the army in a service so closely related to political action produced not a little prejudice against the entire military establishment."¹³

Due to the threats among the factions to prevent others from voting, the Federal government deployed Army units to protect the polling places. This permitted Blacks to vote. Many White Democrats perceived this as military involvement in politics.

The Democrats especially opposed the use of troops at election polling places since the administration of President Ulysses S. Grant, a Republican, emplaced the soldiers. The result of the election was unclear. During the night of the election, "someone at Republican headquarters noticed that if Hayes carried South Carolina, Florida, and Louisiana, where the

party controlled the voting machinery, he would have a one-vote Electoral College majority.”¹⁴

Rutherford B. Hayes

gave tacit approval to a series of complex negotiations involving his close political associates, representatives of South Carolina and Louisiana Democrats, in a group of self-appointed schemers who hoped to promote their own vision of a New South. As an immediate objective, these efforts aimed, withdrew assurances that the next administration would treat the South with "kind consideration," to detach enough Southern Democratic Congressman from Tilden to ensure Hayes's election.¹⁵

The Republican and Democratic Parties reached a compromise that resolved the election deadlock. The Democrats conceded the presidential election to Rutherford B. Hayes. In return, the Republican Administration withdrew Federal troops from the South. This, in effect, ended Reconstruction. "Within two months of taking office, Hayes ordered federal troops surrounding the South Carolina and Louisiana statehouses to return to their barracks." ¹⁶ The government relieved the Army of its mission of protecting the state governments. The Democrats achieved their objective of removing the Army out of the South. This permitted White Democrats to regain control of the state governments and the Congressional seats in the Federal government. However, the military had contributed to reasserting civil order in the South. The Army had successfully accomplished its mission.

In addition to the withdrawal of Federal troops from the South and the temporary end of the Army's civil law enforcement mission, the military involvement during the 1876 presidential election would later contribute to the passage of the Posse Comitatus Act. The Democrats and Republicans were able to resolve the disputed results peacefully. Later, however, the "hotly contested presidential election of 1876 directly led to the passage of the PCA"¹⁷ (Posse Comitatus Act). The Democrats wanted to restrict further use of the military in civil law enforcement because they perceived that the Republicans employed it for a political advantage. Democrats would draft the Posse Comitatus legislation. The Army, however, attempted to remain neutral in the political debate and to execute the mission that the government assigned it. As Reconstruction ended, the Army withdrew from the South, but it would soon have other civil order missions.

ARMY EMPLOYMENT DURING THE RAILROAD STRIKE OF 1877

The conclusion of Reconstruction did not foreshadow the end of the use of the Army in internal civil affairs. The military, and the Regular Army especially, executed the task of maintaining civil order.

Within three months of the end of Reconstruction, the Hayes administration confronted one of the bitterest explosions of class warfare in American history -- the Great Strike of 1877. Beginning on July 16, when workers on the Baltimore and Ohio Railroad walked off their jobs at Martinsburg, West Virginia, to protest a wage cut, the strikes spread westward along the great trunk lines, affecting every region of the country except New England and the Deep South and expanding to other industries. In Pittsburgh, traffic was halted on the Pennsylvania Railroad, and miners and steel workers organized sympathy strikes. Militiamen were brought in from Philadelphia to replace local units who refused to act against the strikers, and when they fired on crowds that had seized railroad switches, killing 20 people, outraged citizens set fire to the Pittsburgh railroad yards.¹⁸

The Army became an instrument to break strikes and enforce civil order in 1877. There were labor disputes throughout the United States. The strikes led to riots. Railroad workers disrupted rail service and destroyed railroad property. Local police and the state militias could not quell the riots. Finally, local authorities and railroad company executives called for assistance. "In the summer of 1877 the Hayes administration used troops in the wave of railway strikes that marked the country's first great national labor dispute. These strikes spread to a dozen or more states and led to a number of requests for federal help."¹⁹ The Federal government employed the Regular Army to restore order.

Federal officials sent approximately 450 Marines and soldiers to Baltimore. "On Sunday morning July 22, the troops arrived. When the soldiers entered the city they were met with a few jeers and stones from her crowd at Camden Station, but the regulars executed a port arms with fixed bayonets, and the mob quickly disbursed."²⁰ The discipline and show of force of the soldiers prevented further rioting.

In Pennsylvania, the Federal government deployed troops to open the rail lines. Major John Hamilton was in command. Trains carrying the soldiers went through Johnstown, Pennsylvania. "The mob showered the first train, carrying Hamilton and ten companies of regulars, with stones. The rocks broke many windows on the train and bruised and cut several of Hamilton's soldiers."²¹ As the train reversed direction to confront the crowd, it came off of the tracks. Hamilton, "ordered skirmishers out around the wrecked train, then led some of his troops back into Johnstown and arrested every man inside."²² This was an effective use of the military to enforce civil laws.

The Regular Army performed extremely professionally during the labor disputes.

Under the circumstances of their use, federal troops came into only limited contact with mobs during the 1877 strikes. They nevertheless contributed greatly to the restoration of order, as Hancock reported, 'by their presence alone.' The positive results were not due to the size of the forces, for with only about 24,000 troops in the entire Army in 1877 only a small detachment could be used at any one place. But these Regular troops were well

disciplined and, taking their cue from the President himself, they acted with considerable restraint in putting down the strikes, neither losing a single soldier nor causing the death of any civilian.²³

The militia, on the other hand, was not as disciplined or well trained. "The National Guard's performance was particularly dismal. Its units were almost completely unreliable. Some refused to serve, some broke up and joined the strikers, while others were bloodthirsty and nearly uncontrollable."²⁴ The difficulty with the citizen-soldiers during this crisis was that they were too close to their fellow citizens. For some, their connection to the strikers was stronger than their sense of military duty.

Although the militia did not perform as well as the Regular Army during the recent civil disorder events, the lessons learned by the former led to an improved and reliable military force that could effectively react to these situations. The public and military identified the necessity for the militia, and not just the Regular Army, to conduct the mission of controlling internal disturbances. An editorial in the publication *United Service* stated that:

The labor riots of 1877, direful as were the events . . . may yet prove a blessing in disguise. In so saying we refer to the unmistakable change for the better which has taken place within the last two years in the organization and training of the militia in many of the states, and which is directly traceable to the experiences of eventful summer of the year mentioned.²⁵

The Regular Army was an example to the militia. The negative experience during the Railroad Strikes of 1877 forced the militia to improve its training. As a result, the militia developed the ability to maintain civil order as well as, if not better than, the Regular Army.

AN ASSESSMENT OF THE ARMY'S PERFORMANCE DURING THE CIVIL STRIFE OF THE 1870'S

The Federal government viewed the strikes on the railroads and the subsequent riots as a significant threat to the economic well being and civil order of the country. Because of this, President Grant believed that it was appropriate to deploy the Regular Army in order to stop the violence and to open up the rail lines. During the Railway Strikes, the strikers and Democrats believed that the use of troops showed that the Army was biased against the common man and that it was an instrument of big industry. The violence of the strikers, however, convinced many in the United States that it was an appropriate use of force to quell the riots. However, Congress wanted to limit the use of the military in civil law enforcement.

Without swift action by the Army, the strikes and civil disturbances may very well have spread throughout the country. Therefore, this was an appropriate use of the Army due to the significant threat to the internal security of the country. As the Railway strikes began to spread

westward through Pennsylvania, it appeared as if the strikers were gaining momentum. There were problems with the employment of militia units. As the Regular Army units began to appear at the strike locations, they presented a force to be reckoned with. The strikers realized that they could not confront the well-drilled troops.

The media demonstrated public support for the use of the military in civil disturbances following the Railway Strikes of 1877.

Above all, the public press supported the use of federal power to crush those who interfered with the property rights of management in the rights of non-strikers to work. At the very outbreak of disorder in 1877, the Philadelphia Inquirer demanded that strikers and rioters be suppressed and punished and, "if this can only be done by the aid of the United States troops, those troops will never have aided in a better cause."²⁶

As a backlash from the violence of the riots, the strikers lost popular support. The public, in general, concurred with the newspapers that the military performed well. They saw it as the lesser of two evils to use troops in quelling violent riots. Public support for the Army was high.

The media also favored the use of the Regular Army, in lieu of the militia, to maintain civil order.

The New York Times saw it as natural that when the nation needed drilled and reliable troops it turned to the Army. 'One thousand of them are worth all the militiamen . . . brought into the service' in 1877. The value of regulars was that they were 'soldiers everyday of their lives; they ask for nothing but their orders, and their moral influence is double that of' citizens soldiers. 'Mobs appreciate the difference so clearly that as a rule regulars are able to effect without firing a shot what militia could not accomplish without severe fighting.'²⁷

The Regular Army, through its actions, proved its worth to the country. The fact that this was apparent to the media led to even more support for the Regular Army in this mission.

General Winfield S. Hancock also believed that the Regular Army performed superbly during the crisis. General Hancock was one of the most respected and successful senior commanders during the Civil War. Additionally, Hancock was a Democrat. He would later run for president on the Democratic ticket in 1880. He wrote, concerning the Army's employment during the 1878 strikes, that "the troops have lost the government no prestige. . . . It was the moral force of the United States government that was displayed - not its physical force. . . . Not a drop of blood has been shed - nor as far as I know, has a shot been fired by our troops."²⁸

Since the Democratic Party opposed the use of the military in civil disorders and given General Hancock's political leaning, this statement lends even more credibility to the fact that the Army performed well during the civil unrest of 1878.

This convinced some senior ranking officers that the Army should continue to seek out missions to maintain civil order. Brigadier General Wesley Merritt in 1893 advocated the use of the Army as a national police. In discussing the riots of 1877, he wrote, "It is a fact that wherever the army was, in even the smallest force, the mobs were awed into silence and quietness, and peace, without the destruction of property or loss of life, was established; and where the army was not, the reverse occurred."²⁹ He believed that one important mission of the army was maintaining civil order within the country. He thought that the discipline of the Regular Army made it superior to the militia in accomplishing this task.

Merritt also argued for a larger army and this contributed to his belief in the importance of maintaining civil order. He stated, "From whatever point of view the operations of the army are discussed, whether as a force to defend the country against foes from without, to fight Indians and compel their obedience to the laws of civilization, or to maintain the domestic peace of the nation, one fact is prominent above all others, and that is that our army has not been, and is not now, of adequate strength."³⁰ Although Merritt's main point in this statement was a desire for a larger Regular Army, he also felt that maintaining civil order was a proper mission for the military.

President Grant had been severely criticized by some factions for using the Army during the election of 1876. Following the successful suppression of the railroad strikes in 1877, however, he felt vindicated. He wrote

The entire Democratic party and the "morbidly honest and 'reformatory' portion of the Republican" had thought it 'horrible' to employ Federal troops "to protect the lives of Negroes. Now, however, there is no hesitation about exhausting the whole power of the government to suppress a strike on the slightest intimidation that danger threatens."³¹

Grant, and many others, believed that it was an appropriate and justified use of the military. The Army demonstrated that in order to protect citizens, prevent the destruction of Federal property, and to maintain domestic tranquility, there are times the government should and must use the Army in internal affairs.

Although, from the Army's perspective, it successfully accomplished the mission of protecting the polling places in the Presidential election of 1876, some political factions in Congress held it against the Army. "Angry Democrats, now further incensed by the use of troops in the South during the election of 1876, assailed the Army again in the second session of the forty-fourth Congress."³² This retribution took the form of proposed reductions in funding and a decrease in the size of the force. The Army, already significantly reduced to bare minimums since the conclusion of the Civil War, would have to fight for its very existence.

DEVELOPMENT OF THE 1878 POSSE COMITATUS LEGISLATION

In reaction to the use of the Army in these internal civil matters, Congress developed the "posse comitatus clause, the restraint on executive use of the army against citizens that Democrats viewed as beyond compromise."³³ "The Posse Comitatus Act accordingly was intended to reinstate regular civil authority in the South, and to confine the role of the military to that which had been viewed to be appropriate before the Civil War."³⁴ The typical role was to defend the nation against an invasion from a foreign country. In addition, the Army was needed for the internal defense mission of fighting any hostile Indians. However, the legislation did not prohibit the Federal government from employing the military in times of civil strife.

The words of the act itself of make it clear that Congress did not intend to restrict or limit the President's use of military forces 'in cases and under circumstances' permitted by the Constitution. Congress could not deprive the president of his inherent constitutional authority to respond to a serious domestic emergency.³⁵

Despite the passing of the Posse Comitatus Act, the President could still employ the military to protect the populace from rioters or factions that desired to overthrow the government. The Army would not be used in this way normally, but could be if required.

The public, in general, agreed with the sentiment that there was value to the military enforcing civil order. "A moderate increase in the Army would endanger no man's liberty, and might conduce much to the maintenance of law and order."³⁶ Despite the desire by Democrats to reduce the military, many people wanted to increase the size of the force. The Army, through its performance, demonstrated how effectively it could protect the populace without detracting from civil rights.

The Secretary of War, George W. McCrary, believed that the Army proved that it could accomplish the mission of maintaining civil order. In his Annual Report for 1877, he wrote:

The great value of a strong Federal force stationed in the vicinity of our great cities would be seen in the prevention of mobs and violence . . . far more than in their suppression. The Army is to the United States what a well disciplined and trained police force is to a city, and the one is quite as necessary as the other.³⁷

Simply by its proximity to large population centers and its past performance, the Army would act as a deterrence to civil disorder. The Secretary of War realized that the military had performed very effectively during the recent civil unrest. He believed that the Army was a valuable asset to prevent or to quell any future violence. Internal defense was a viable mission for the Army. The Federal government needed the military to be prepared for this task in emergencies.

The Army was an instrument of the Republican administrations of Grant and Hayes. They were effective instruments of the policies and assisted in maintaining civil order in 1876

and 1877. Those on the other side, the Democrats during the presidential election of 1876, and the labor strikers of 1877, did not agree with these policies of employing Federal troops. Despite this, the use of the Army was a measured and well thought out response to the threats.

Although the Posse Comitatus Act was a direct result of the Army's involvement in the presidential election and Railway strikes, the Federal government's deployment and the Army's execution of the missions were appropriate and successful. The Act was, in part, a political compromise between the Republicans and the Democrats. By almost all accounts, the Federal government was justified in its use of the Army and the Army officers in charge of the operations were not biased against the Democratic party.

Many in Congress, especially the Democrats, wanted to reduce the size of the Army in 1878. The Great Sioux War of 1877 - 1878 was over. Congress did not see a significant threat that required as large an Army. The Posse Comitatus Act was a rider to the Army Appropriations Act. Since this rider was attached to the Appropriations Act, Congress had to pass the Posse Comitatus Act for the Army to receive funding in 1878. After debate, the legislation ultimately passed. The Posse Comitatus Act did two things. First, it prevented the use of the Army by the local sheriffs. It was also seen as limiting the power of the President by restricting the Army's ability to become involved in the local political/civil affairs. It did not, however, prevent the use of the Army to suppress civil disorder. The intent, however, was that this would not become a routine matter. In the 1870s, the Regular Army clearly demonstrated that it could effectively contribute to maintaining civil order. Despite the opinions of critics, the use of the Army did not lead to widespread bloodshed or significant abuse of the civil rights of the populace. If the circumstances require, the Army and the military as a whole could again accomplish this mission with similarly satisfactory results.

INTENT OF THE POSSE COMITATUS ACT

The original purpose of the Posse Comitatus Act was not so much to prevent the military from meddling in civilian law enforcement as is the current perception.

The Posse Comitatus Act was not, . . . as most people believe, enacted to prevent members of military services from acting as a national police force. It was enacted to prevent the Army from being abused by having its soldiers pressed into service as police officers (a posse) by local law enforcement officials in the post-Reconstruction South.³⁸

The real intent of the Posse Comitatus Act was to prevent civilian law enforcement from taking advantage of the military to assist in apprehending suspected criminals. Especially in the South during Reconstruction and in the western United States, local sheriffs would "call out the posse." They would draft into service local civilians and, if available, military troops to track down and

arrest criminals. The Posse Comitatus Act prohibited local civilian authorities detracting from the military's primary mission.

Over the years, the military and the nation have developed a notion that the intent of Posse Comitatus is restrictive. There is also the belief that the monetary fine contained in the Act's language is directed against military officers from engaging in military police state-type activities. In actuality, the lawmakers determined that the Posse Comitatus would actually protect the military from having to conduct the civilian police functions at the whim of some local sheriff. The intent of the \$10,000 fine was not originally intended against the military but against the local civilian law enforcement or political officials who would attempt to force the military to assist in their function. This originally intended purpose has significant implications for today. Military officers have come to the belief that Posse Comitatus exists to prevent the military from taking over as a police state. This is not the case. This is why it is necessary for Congress, the Department of Homeland Security, and Northern Command to review and update the Posse Comitatus Act. The United States of America is a country of laws. Lawmakers and lawyers use laws to establish precedent. The misunderstanding of the intent of the precedent of the Posse Comitatus Act is a cause for concern. With a reevaluation of the law, it is apparent that the Congress even in the 1870s did not intend to totally prevent the military's involvement in civil law enforcement.

CURRENT IMPLICATIONS OF THE POSSE COMITATUS ACT

MILITARY SUPPORT TO CIVILIAN LAW ENFORCEMENT AFTER 9-11

With the increased threat of terrorism in the post 9-11 world, and with the possible increase in terrorism in response to the war with Iraq, the prevention of terrorism is a vital portion of the National Security Strategy and National Strategy for Homeland Security. The Federal government and the military of the United States must do everything within their abilities to prevent catastrophic attacks such as those that occurred on the Pentagon and the World Trade Center. The Federal government must not become a police state and the military should not become a Federal police force. The civil liberties and freedoms established in the Constitution and the Bill of Rights are integral values of our country and must not change. If this were to happen, Al-Qaeda and the terrorists would have won by significantly changing our way of life. This would not be acceptable to the American people. The military, most especially, has no desire to assume civilian law enforcement as a routine and daily mission. The values and traditions of the military services are not consistent with civilian law enforcement missions. According to Field Manual 22-100, Army Leadership, duty is one of the Army Values. "Duty

begins with everything required of you by law, regulation, and orders.”³⁹ Also important is the Oath of Enlistment, which states that, “I will support and defend the Constitution of the United States against all enemies, foreign and domestic.”⁴⁰ This clause is very often forgotten. However, in times of crisis and emergencies, the military must be able to defend against enemies from within the homeland.

The National Strategy for Homeland Security states that one of the major legislative initiatives to assist in the Global War on Terrorism is to, “review authority for military assistance in domestic security.”⁴¹ This is an important aspect facing the Federal government. In order to accomplish this review, Congress must reappraise the Posse Comitatus Act.

According to the Quadrennial Defense Review Report dated 30 September 2001, “the purpose of the U.S. Armed Forces is to protect and advance U.S. national interests and, if deterrence fails, to decisively defeat threats to those interests.”⁴² Additionally, it declares the enduring national interests, including, “Ensuring U.S. security and freedom of action, including: U.S. sovereignty, territorial integrity, and freedom; safety of U.S. citizens at home and abroad; protection of critical U.S. infrastructure.”⁴³ This document affirms the important role of the military for internal defense.

The Department of Defense established Northern Command (NORTHCOM) on 1 October 2002. The intent was to consolidate missions that separate organizations did prior to its creation.

The command’s mission is homeland defense and civil support, specifically: conduct operations to deter, prevent, and defeat threats and aggression aimed at the United States, its territories, and interests within the assigned area of responsibilities; as directed by the President or Secretary of Defense, provide military assistance to civil authorities including consequence management operations.⁴⁴

In cases of emergency, forces may be allocated to NORTHCOM to accomplish its missions. In the case of internal defense, Army or Marine forces could, in certain circumstances, conduct direct support to law enforcement.

Depending on the situation, the military must be prepared to assist local, state, and federal law enforcement agencies. If a significant terrorist attack were to arise, or even a significant and credible threat, the military is an important asset to the Federal government and to the Department of Homeland Security. In order to fully support and effectively execute this mission, there most likely will be instances where the Federal government must lift the restrictions inherent in the Posse Comitatus Act.

In the event of any weapons of mass destruction/effects attacks by terrorists, the military must respond immediately to assist in securing the area and to mitigate the effects of the attack. In situations such as this, the military will be a key asset to the first responders. The delay incurred in waiting for a presidential authorization may lead to more casualties and more damage. Additionally, in the event of a significant terrorist attack, civilian law enforcement may require direct assistance from the military immediately. Northern Command, responsible for Homeland Defense, must establish and determine the possible situations where military forces could be used effectively and then establish training requirements for the services. In these select situations, the local military commander should have the authorization to deploy forces to support the law enforcement agencies. If the military could assist in apprehending terrorists, it will be worthwhile despite the possible inconveniences or shortcomings caused by this low level authority.

CONGRESS AND THE MILITARY MUST REVIEW THE POSSE COMITATUS ACT

We live in a different time. In the 1870s, the internal threats to security were the Indians, civil labor unrest throughout the country, and the fresh memory of the Civil War and the subsequent unrest throughout the Southern states during reconstruction. Today, however, the internal threat may be from terrorists that can easily hide in our society. The military must never be the first line of law enforcement in our country. This should only occur if there is rampant civil unrest throughout the country. This is unforeseen in the current environment. It is unlikely that today's terrorist threat will cause such a crisis. Additionally, if the military were used extensively and unnecessarily in law enforcement, American society could possibly be driven toward more unrest. However, for anything short of total civil strife, the military is an excellent tool as a second line of defense behind the highly capable civilian law enforcement agencies. Since September 11, 2001, these agencies have reviewed their policies and training for terrorist attack contingencies. They have become much better prepared for the situation. The military must conduct coordination and training with these agencies on a routine basis. This will better prepare law enforcement and the military and will also be a deterrent to terrorists. This must be part of the information campaign to reassure the American populace and also to warn any potential terrorists within the United States or in other countries that desire to harm us.

There are a number of possible recommendations to improve the Posse Comitatus Act. One aspect is to enable the government to place Federal units under the control of the State governors in times of emergency. This, in effect, would be the reverse of Title 32 of the United States Code. Title 32 permits State governors to employ National Guard units from that State

during emergencies. While under Title 32 authorization, National Guard forces are not restricted from conducting law enforcement operations. By allocating Federal units to the States, the Posse Comitatus restrictions on support to civil law enforcement would be lifted. It would also maintain unity of command for emergencies under State officials. Additionally, there must be an information operations/public affairs campaign to educate the Federal government, military, and the general public on the history of the Posse Comitatus Act. Understanding the historical background would dispel many myths about the military's involvement in domestic support operations. It would also reassure the public that the military can effectively execute this mission without abusing civil rights. The support of the American people is an important aspect of the military's assistance to civilian law enforcement. These changes would improve the Armed Services' ability to react to terrorist threats and acts and to support the first line of defense, which are the State and local authorities.

The terrorist attacks of September 11, 2001 underscore the importance of the Posse Comitatus Act to homeland security. The military will play a vital role in defending the homeland against the likes of Al Qaeda. Although the President has the authority to lift restrictions on the use of the military for law enforcement in times of crises, the Federal government must review the history and purpose of the Posse Comitatus Act. The historical context of this Act dispels many false impressions concerning the originally intended purpose of Congress. During the two national emergencies that led Congress to enact the legislation, the Army performed magnificently in the civilian law enforcement support mission. The military did not abuse their power. Today's United States military can execute the mission of support to civilian law enforcement as effectively with discipline and restraint. The Federal government should permit the armed forces to perform this task when required. It should do this by reevaluating the Act. The original law was a political concession to end Reconstruction in the South and to prevent the Republican Presidential administrations from wielding too much power. The current legislation is poorly worded and imprecise. The national and international situation has significantly changed in the 125 years since the passing of the Posse Comitatus Act. The disparate circumstances of the 1870s and today, by itself, dictate a thorough review of the provisions of the law. It is absolutely necessary for the military and the Congress of the United States to update and rewrite the Posse Comitatus Act.

Word Count: 7,297

ENDNOTES

- ¹ Bonnie Baker, "The Origins of the Posse Comitatus", Air & Space Power Chronicles, 1 November 1999, 1.
- ² Title 18, U.S. Code, Section 1385
- ³ The Army and Civil Disorder, Jerry M. Cooper, p.8.
- ⁴ American Military History, Maurice Matloff, p. 283.
- ⁵ American Military History, Maurice Matloff, p. 284.
- ⁶ John R. Brinkerhoff, "The Posse Comitatus Act and Homeland Security," Internet, www.homelandsecurity.org, February 2002, 3.
- ⁷ American Military History, Maurice Matloff, p. 285.
- ⁸ American Military History, Maurice Matloff, p. 285.
- ⁹ A Short History of Reconstruction, p. 233.
- ¹⁰ A Short History of Reconstruction, p. 234.
- ¹¹ A Short History of Reconstruction, p. 234.
- ¹² Frontier Regulars (See The Army of the United States), p.61.
- ¹³ Frontier Regulars (See The Army of the United States), p.60.
- ¹⁴ A Short History of Reconstruction, Eric Foner, 242.
- ¹⁵ Ibid, 242.
- ¹⁶ A Short History of Reconstruction, Eric Foner, p. 244.
- ¹⁷ Matthew Carlton Hammond, "The Posse Comitatus Act: A Principle in Need of Renewal" in Washington University Law Quarterly, Summer 1997, 2.
- ¹⁸ A Short History of Reconstruction, Eric Foner, p. 245.
- ¹⁹ American Military History, Maurice Matloff, p. 285.
- ²⁰ The Army and Civil Disorder, Jerry M. Cooper, p.50.
- ²¹ Ibid, 55.
- ²² The Army and Civil Disorder, Jerry M. Cooper, p.55.
- ²³ American Military History, Maurice Matloff, p. 286.

- ²⁴ General Wesley Merritt.
- ²⁵ The Army and Civil Disorder, Jerry M. Cooper, p.12.
- ²⁶ The Army and Civil Disorder, Jerry M. Cooper, p.211.
- ²⁷ The Army and Civil Disorder, Jerry M. Cooper, p.212.
- ²⁸ The Army and Civil Disorder, Jerry M. Cooper, p.61, to General Schofield, July 30, in a GAO No. 4042.
- ²⁹ The Armies of Today, p. 50.
- ³⁰ The Armies of Today, p. 51.
- ³¹ A Short History of Reconstruction, Eric Foner, p. 247.
- ³² Frontier Regulars (See The Army of the United States), p.62.
- ³³ Frontier Regulars (See The Army of the United States), p.64.
- ³⁴ U.S. Armed Forces and Homeland Defense: The Legal Framework, Paul Schott Stevens, p. 23.
- ³⁵ U.S. Armed Forces and Homeland Defense: The Legal Framework, Paul Schott Stevens, p. 24.
- ³⁶ Review of Reviews, see The Army and Civil Disorder, Jerry M. Cooper, p.215.
- ³⁷ The Army and Civil Disorder, Jerry M. Cooper, p.216.
- ³⁸ John R. Brinkerhoff, "The Posse Comitatus Act and Homeland Security," Internet, www.homelandsecurity.org, February 2002, 2.
- ³⁹ Field Manual 22-100, Army Leadership, August 1999, 2-4.
- ⁴⁰ Ibid, 2-1.
- ⁴¹ The National Strategy for Homeland Security, July 2002, xi.
- ⁴² Quadrennial Defense Review Report, 30 September 2001, p. 2.
- ⁴³ Quadrennial Defense Review Report, 30 September 2001, p. 2.
- ⁴⁴ U.S. Northern Command Website.

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